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IN THE

Supreme Court of the United States

OCTOBER TERM [redacted] 1970

No. [redacted] 1177

GABRIEL FELICE,

Petitioner,

against

THE LONG ISLAND RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Gabriel Felice, a disabled railroad employee of the Long Island Railroad who, after a trial by jury and verdict in his favor, obtained a judgment against the respondent Long Island Railroad, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered February 25, 1970, which reversed the judgment of the District Court.

Opinions Below

The charge of the District Court to the jury Charles M. Metzner, D. J. (Appendix pp. 18 to 32) printed in the Appendix hereto is unreported. The opinion rendered in

the Court of Appeals by Judges Lumbard, Friendly and Mansfield, printed in the Appendix hereto, *infra* pages 33 to 44 is unreported.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered February 25, 1970. The jurisdiction of this Court is found in 45 U.S.C.

Questions Presented

Whether the decision and judgment of the Court of Appeals herein improperly invaded the jury's function and province under the Seventh Amendment to the Constitution of the United States and controlling decisions of the Supreme Court of the United States and erroneously deprived petitioner of the District Court judgment entered upon the verdict of the jury.

Constitutional Provison Involved

The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Statement of Case

Petitioner, an employee of L.I.R.R., instituted an action at law in the U. S. District Court for the Southern District of New York against the respondent employer, the

L.I.R.R., for damages for personal injuries sustained while he was working in the course of his employment for the L.I.R.R. After trial before D. C. Judge Charles M. Metzner, the jury rendered a verdict for petitioner for $100,460.00 (Tr. 385). Motion to set aside verdict was denied by Judge Metzner.

An Appeal by said respondents to the Court of Appeals for the 2nd Circuit, a panel of that court (Lumbard, Friendly and Mansfield) reversed, with an opinion by Judge Friendly.

The only evidence offered as to the actual happening of the accident was the plaintiff's testimony. Two actual eyewitnesses still employed by the railroad were not produced to tell their version of the accident.

Facts

The plaintiff testified "He was picking up this tank with Billello and Billello was pivoting around to put it on the hi-lo. I was following him. I took two or three steps and I stepped forward with my left foot and I slipped and twisted my back and I went down. Whether I hit my back or I hit something or fell on my back, I don't remember" (Tr. 82). "Both of them ran out of the pit. Pete ran out of the pit and Billello must have dropped his end because I don't remember what he was doing" (Tr. 36).

Felice noticed, while he was on the ground, "a big glob of grease and oil at the place where he fell" (Tr. 37).

He further testified that he had seen oil and grease on the shop's floor and that he made complaints about the condition, as had Billello, Mazzeo, and other fellow employees in the shop (Tr. 37).

Further testimony also revealed that he complained to Joseph Cardonna for a cleaning compound and this was never available.

He reported that he had slipped to his foreman, Joseph Cardonna, shortly after the accident occurred.

On cross-examination, he testified that on occasions he and other co-employees refused to work because of the greasy condition in the shop (Tr. 79).

The only testimony offered by the defendant, Long Island Railroad, was given by Mr. Cardonna, who was not a witness to the accident. The foreman testified that he had no definite recollection of the day of the accident, and the question was left up in the air as to whether he got the information from Billello or the plaintiff (Tr. 44, 238, 241).

The accident report, Defendant's Exhibit A, was introduced into evidence and on direct examination by the Railroad's attorney Mr. Cardonna was asked the following questions:

"Q. Who reported the injury here? A. I would say Gabe, but I am not certain." (Tr. 243)

He further testified on direct examination:

"Q. Mr. Cardonna, Peter Mazzeo and Domenick Billello, so far as you know, are still employed by the Long Island Railroad? A. Yes." (Tr. 244)

Billello and Mazzeo's absence was not explained. In fact, the foreman was asked the following questions:

"Q. Was Mr. Billello and Mr. Mazzeo also called? A. I believe Mr. Mazzeo was called, I don't know about Billello.

Q. Was he called yesterday into the office? A. Mazzeo was called, Mazzeo reported to me he had to be in court yesterday.

Q. Billello still works for the Long Island Railroad? A. As far as I know." (Tr. 245)

Further in his cross-examination he was asked the following questions:

"Q. Would you look at this report. Does it indicate that Mr. Billello gave you some information in connection with the accident? A. It does.

Q. Does it indicate that Mr. Billello gave you the information as to what happened? A. It does.

Q. Does it also indicate that Mr. Billello was with Mr. Felice when this accident took place? A. It does." (Tr. 246)

As part of Exhibit A, there is a specific question that was answered by Cardonna, the only witness to testify by the Long Island Railroad, and the question on the accident report is as follows:

Condition of equipment, facilities, etc. The answer "Good" was inserted.

On cross-examining the defendant's one and only witness, he testified as to the condition in the shop as follows:

"Q. Did Mr. Billello ever complain about grease at the Dunton Shop before this accident took place? A. I don't recall if Mr. Billello did, he might have. I don't recall at the present time.

Q. Did others complain about the grease? A. They did.

Q. Did they complain often? A. I wouldn't say often, but on a number of occasions they have claimed the pits and aisles were dirty with grease.

Q. Did you as supervisor or foreman see that they were greasy and oily on occasion? A. At times I did.

Q. Was there quite an accumulation of grease and oil there on occasion? A. At times there was, yes.

Q. That includes oil? A. Oil. That is what we are talking about, oil and grease.

Q. Did you report it to your supervisors? A. This has been a known fact, that it has been reported time and time again, to foremen, gang foremen and myself.

Q. Have men been hurt as a result of slippage on grease? A. I imagine so." (Tr. 249)

Mr. Cardonna further testified:

"Q. Do you have any responsibility for making certain that the greasy condition is cleaned up? A. Well, we have another foreman in charge of laborers. It is his responsibility.

Q. It is his primary function? A. Right." (Tr. 253)

Mr. Kristol, defendant's trial counsel, in his opening remarks stated (Tr. 15):

"The proof will further show that while lifting this drum with Mr. Billello, the other employee at the other end of the drum, Mr. Felice made a grunt and he said to Mr. Billello, 'My back just went.' There wasn't anything about slipping or falling."

Mr. Billello was listed in the pre-trial order of the Long Island Railroad as one of the witnesses that they would produce. (He was not listed in our pre-trial order.)

Mr. Billello was never produced as a witness, even though the defendant's lawyer quoted what Mr. Billello was going to say.

In his summation, Mr. Kristol sang an entirely different tune.

He indicated that the plaintiff should have subpoenaed Mr. Billello. He did admit that Billello was still employed by the Railroad and available to testify (Tr. 15).

Defendant's counsel also indicated in his opening "The proof will show that Mr. Felice was certainly aware that there was grease in the shop and the railroad was aware of that." He claimed they supplied a product known as Dries-It, which was available to employees. He indicated

further that this was available and it could have been put on the floor to clean up the grease (Tr. 16).

No one was produced such as the foreman in charge of maintenance to testify that such substance was available and used at the place where Mr. Felice fell or to testify that there was no grease at the place where he fell.

Felice indicated on direct examination that speedy-dry was not available (Tr. 37), that there was no cleaning compound available (Tr. 79-80).

The defendant's lawyer, when he introduced Exhibit A into evidence vouched for the truthfulness of his report and it is evident, even from the one and only witness for the Railroad, that the condition was not good as indicated, that the shop was actually covered with grease and oil, and no attempt was made to clean up the condition and in fact, the oil and greasy condition caused the injury to Mr. Felice.

The jury verdict clearly established that they accepted the plaintiff's version of the accident that he was not given a safe place to work and that he had fallen during the course of his employment as a result of the negligence of the L.I.R.R.

Judge Friendly in his opinion reversed the lower Court, not because the issue of a safe place was not presented to the jury, but because of three errors ascribed to the trial Court. "We need not decide whether any one of the three errors standing along would demand reversal. Their combined effect requires that the judgment be reversed for a new trial consistent with this opinion."

Reasons for Allowance of the Writ

I. "Special and important reasons for the grant of certiorari" exist because the Court of Appeals by its reversal has deprived petitioner of a judgment entered upon the verdict of a jury awarding petitioner damages for

personal injury caused by negligence of the Long Island Railroad and certiorari should be granted for this Court to consider whether the decision below improperly invaded the function and province of the jury (*Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500, 510; *Gallick* v. *Baltimore & Ohio Railroad Co.*, 371 U. S. ; 83 S. Ct. 659; 9 L. ed. 2d 618; *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines*, 369 U. S. 355, 359, and cases cited).

In *Rogers* v. *Missouri Pac. R. Co., supra,* this Court said:

> "Special and important reasons for the grant of certiorari in these cases are certainly presented when lower federal and state courts persistently deprive litigants of their right to a jury determination." (352 U. S. 510)

At the present term of this Court, in *Gallick* v. *Baltimore & Ohio Railroad Co., supra,* decided February 18, 1963, where an Ohio state Court of Appeals had reversed a judgment rendered on a jury verdict for plaintiff for personal injuries caused by being bitten by an insect while working near a fetid pool on respondent's property, this Court granted certiorari and reversed, saying:

> "This Court granted certiorari, 369 U. S. 848, to consider the questions of whether the decision below improperly invaded the jury's function."

In *Harrison* v. *Missouri Pac. R.R. Co.*, 83 S. Ct. 690, 9 L. ed. 2d 711, decided February 25, 1963, where an Illinois trial court had set aside a jury verdict for plaintiff, a section foreman who had been assaulted by a section hand, and the Appellate Court of Illinois had affirmed, this Court granted certiorari and reversed *per curiam* and said:

> "We think that the Illinois Courts improperly invaded the function and province of the jury in these cases."

In *Basham* v. *Pennsylvania R.R. Co.*, 10 L. ed. 2d 80, 83 S. Ct. ——, decided April 15, 1963, where a New York trial court had set aside a jury verdict for plaintiff, a car repairman employee of the railroad, and the New York Appellate Division (10 A. D. 2d 948) and Court of Appeals (11 N. Y. 2d 991) had affirmed without opinion, this Court granted certiorari and reversed, saying:

> "This Court granted certiorari, 371 U. S. 860, to consider the propriety of the trial court's action."

While the *Rogers, Gallick, Harrison* and *Basham* cases, involved the Federal Employer's Liability Act, this Court in *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines, supra,* 369 U. S. 355, 359, 360, held that the same principle applied under the Seventh Amendment where, in an action to which the Federal Employer's Liability Act was inapplicable, a judgment had been rendered on a jury verdict awarding a longshoreman damages against a shipowner, but disallowing recovery by the shipowner against the stevedore, and the latter had been reversed by the Court of Appeals. This Court said:

> "We might agree with the Court of Appeals, had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.
>
> "As in cases under the Jones Act, 46 U.S.C.A. § 688 (*Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523; *Senko* v. *La Crosse Dredging Corp.*, 352 U. S. 370), and under the Federal Employers Liability Act, 45 U.S.C.A. § 51 et seq. (*Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29; *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, 653; *Dice* v. *Akron, C. & Y. Co.*, 342 U. S. 359; *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500),

trial by jury is part of the remedy. Thus the provisions of the Seventh Amendment, noted above, are brought into play."

Clearly, therefore, the special and important reasons stated for the grant of certiorari in the *Rogers, Gallick, Harrison, Basham* and similar cases exist equally here where the petitioner was a railroad man when injured and has been deprived by a Court of Appeals of a judgment entered upon a jury verdict awarding him damages for personal injuries caused by negligence of the railroad; and a writ of certiorari should be granted to determine whether the decision below has improperly invaded the jury function.

II. Clearly, the reversal herein violates the Seventh Amendment and conflicts with decisions of this Court which have held that lower court decisions invaded the function of the jury.

The Trial Judge, Metzner, cited *Case v. N. Y. Central*, 329 Fed. 2nd 936, as authority for an inference to be drawn against the failure of a party to call a witness (Tr. 380) and it is interesting to note that the same Judge Friendly wrote that opinion but apparently without sufficient clarity so as to allow the lower court to have anything to follow in matters such as this. The effect of this decision would be to negate all inferences, it would be warm water to be spit out. In his opinion (1640) Judge Friendly states "We think in the press of the trial the Judge read these authorities too hastily."

POINT I

The District Court did not err in charging that the failure of the defendant to call Billello and Mazzeo would have exposed facts unfavorable to the defendant.

The Court's discretion in charging as it did was certainly warranted since: (1) both witnesses were listed in the defendant's pre-trial memorandum.

2. That defendant's counsel mentioned Billello in his opening and indicated exactly what he would testify, and then failed to have him in Court.

3. In addition to the above, Mr. Cardonna, the immediate foreman of the three men in question, testified that both Billello and Mazzeo were still employed, and still under the control of the defendant, and in fact, Mazzeo had advised Cardonna that he had been told by the Claim Department to be in Court the day before Cardonna testified.

The defendant then failed to present either of these witnesses who were present at the time of the accident and who could have testified if it were the fact that Mr. Felice did not slip, that there was no oil and grease at the place where he hurt himself, and further, that there were no complaints made by fellow employees about the oil and grease on the shop's floor. It would have been an abuse of the discretion of the Court not to have charged in the way the Court did charge.

In *Case* v. *New York Central Railroad*, 329 F. 2d 936. Judge Friendly writing for this Court, stated:

> "(1) Case had testified that the accident might have been witnessed by a brakeman named Moore who was sitting in the coach which he boarded thereafter and,

more positively, by a fireman on the yard engine. Although he called neither as a witness, failure by the Central to produce them (or others working in the Albany yard at the time), if unexplained, would have given rise to an inference favorable to him. The failure to bring before the tribunal some circumstance, document or witness when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. 2 Wigmore, Evidence 162 (3d ed. 1940). This principle is frequently applied to failure to call an employee having knowledge or the facts; it suffices to cite a quite similar FELA case, Chicago & N. W. Ry. v. Kelly, 84 F. 2d 569, 572 (8 Cir. 1936)."

Chicago & N. W. Ry. Co. v. *Kelly*, 84 F. (2d) 569:

"There is no merit in the claim that it was error to permit the plaintiff to introduce evidence tending to show that the defendant could have produced, as a witness, Case, the engineer of the train involved in the accident. Kelly at the time of the accident was on the engineer's side of the train. It might reasonably have been expected that Case would be watching for Kelly's lantern signals and might well have observed where his lantern was at the time he was hurt. Kelly had testified that Case came to him within a minute and a half after the accident, and was then told about the defective handhold. It would not be unreasonable to suppose that Case had examined the handhold within a few minutes after the accident. He was a witness whom the defendant would naturally have produced if his testimony would have been favorable to it. The defendant could have offered proof to excuse his absence. We know of no reason why the plaintiff might

not properly show his availability. See, in this connection, Gulf, C. & S. F. Ry. Co. v. Ellis (C.C.A.8), 54 F. 481; Hill v. United States (C.C.A.8), 234 F. 39; Lincoln Nat. Life Ins. Co. v. Erickson (C.C.A.8), 42 F. (2d) 997, 1002."

The import of the Kelly case is clear, and was followed by Judge Friendly in the *Case* v. *N. Y. Central* case but not in *Felice* v. *L.I.R.R.* The second ground for error was failure to strike certain testimony of Dr. Lipton, a treating physician.

POINT II

The District Court correctly refused to strike certain portions of Dr. Lipton's testimony.

The office notes used by Dr. Lipton were reports and notes made by him in the regular and ordinary course of his practice.

On cross-examination the attorney for the defendant asked Dr. Lipton the following questions:

"Q. Doctor, do you have any record with you or do you know of any record of yours that indicates that the plaintiff told you that he slipped and hurt his back? A. Just that point?

The Court: That is right.

A. (Continuing) The first two sentences on my written notes taken in my office reads as follows—

Q. Did—

The Court: Go ahead. 'Reads as follows', you can finish it.

A. (Continuing) 'D-A', meaning date of accident. '3-8-66. Lifted heavy object and slipped on grease.'

Now, that was either written by myself or taken as a history by my girl. It looks like my writing.

Can I finish it?

The Court: That is enough for Mr. Kristol." (Tr. 177-178)

The questions and answers and the ruling by the Court is ample rebuttal to the defendant's first contention. He clearly opened the door on cross-examination. He did not object on direct examination when the following question was asked:

"Q. Doctor, in the course of your practice did you have occasion to see Gabriel Felice, and if you want to refer to your notes at any time to refresh your recollection, if you need any facts, please feel free to do so?" (Tr. 148)

Reference was to notes and not to hospital record (Tr. 148).

The notes used by Dr. Lipton were his office notes made by him in the regular course of his practice and the Court indicates that he believed them worthy of trust (Please see Tr. 285):

"The Court: Normally every doctor who comes into this court testifies that he cannot possibly remember the hundreds and hundreds of patients he has treated everything about them. It is normal procedure to let a doctor look at his record and testify from his record.

The Court: This is his record kept in the regular course of business." (Tr. 285)

The fact that the record is self serving is, of course, not determinative if made in the ordinary course of business without a view toward litigation. See *Bishin v. N. Y. Central R. R.*, 20 App. Div. 2d 921, 249 N.Y.S. 2d 778 (2 Dept. 1964) (Memo).

The Circuit Court, Friendly, J., refers to the 3rd ground for reversal as the introductions of a letter written by

Doctor Askinazy dated August 6, 1966 to Thomas O. Rice claim agent, stating that Felice had been referred by Dr. Lipton with a history that he was lifting a heavy object of 200 lbs. of weight on March 8, 1966 when he slipped on some grease and suddenly had to bear the weight in an awkward position. He felt a snap and a tear in his back.

Apparently in the press of appellate work, the court did not read the record carefully because the portion referred to in the opinion about slipping on grease was deleted and stricken by the court, it was never mentioned to the jury, read to the jury or asked for by the jury during their deliberations. See transcript page 283.

"Mr. Reilly: If the Court pleases, I offer in evidence the report of Moses Ashkenasi, the neurosurgeon. This has been marked for identification as F. The letter is addressed to Thomas O. Rice, general claim agent, Long Island Rail Road, dated August 16.

Mr. Kristol: I object to the admission of so much of the document or letter that refers to the history in this instance.

The Court: What is the basis of your objection?

Mr. Kristol: The history as of the date indicated in that letter is self-serving and of course it is hearsay. I don't believe at least that portion to which I have objected is admissible unless the doctor is here to testify.

The Court: It is unclear whether the doctor got this directly or from somebody else. I will sustain your objection to that portion of the exhibit.

(Plaintiff's Exhibit 9 received in evidence.)"

The 2nd document Exhibit 9 on a New York Workmen's Compensation Form—was introduced and received in evidence. (See Tr. 288).

"Mr. Reilly: This is a report dated 5/18/66 of Dr. Ashkenasi.

Mr. Kristol: Same objection. It is clearly hearsay.
Mr. Reilly: This is the point you are making.
The Court: This is the same kind of report. It is a Workmen's Compensation form. He says that the patient states such and such and he has signed it. I will take it.
Mr. Kristol: May I note my objection?
The Court: It is noted.
(Plaintiff's Exhibit 10 received in evidence.)"

Exhibit 9, a report of Dr. Ashkenazy, a treating physician, who sent this report directly to the Long Island Claim Department and indicated in that report that he had slipped while carrying the tank. This report was supplied to the plaintiff by the defendant under the pretrial procedures and certainly had not been dictated for the purpose of litigation. Rather, the information was obtained by Dr. Ashkenazy on March 24, 1966, when he was called in by Dr. Lipton in consultation for the purpose of treatment within two or three weeks after the accident happened and before there was any thought of litigation.

The admission of Dr. Ashkenazy's report was not prejudicial to the defendant in that no mention was made of slipping on *oil* or *grease*. The only testimony adduced at the trial was by the plaintiff as to oil and grease and Dr. Lipton's testimony as to the history given to him by the plaintiff. The jury apparently accepted this testimony *en toto*.

In *Yates' v. Bair Transport, Inc.*, 249 F. Supp. 681 (1965), Judge Tenny at page 692, stated:

"The Court, with respect to documents following under the Business Records Act, has a limited discretion. The District Courts' discretion with respect to #1732 is a discretion in judging whether the document offered has an inherent probability of trustworthiness. *Central R. D. v. John S. Sottnek Co.*,

> 258 F. 2d 85, 88 (2 Cir. 1958). It is therefore a necessary premise for the exercise that the documents' trustworthiness be in doubt."

In the case of *Mosley* v. *Cia Mar Adra, Sar & Lipsett Steel Product Inc.*, Judge Clark in his dissent stated:

> "This is yet another instance where my brothers deliberately deny the benefits of trial by jury—a matter which as this Court has repeatedly held, presents special and important reasons for the grant of certiorari."

The Court here found Ex. 9 as worthy of trust in that the information was recorded as indicated in the report of March 24, 1966.

CONCLUSION

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted.

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APPENDIX A

CHARGE BY METZER, J.

The Court: Mrs. Lederman, ladies and gentlemen of the jury, we have now reached a point in this trial where you are about to enter upon your final function as jurors, which is, of course, one of the sacred duties of citizenship.

You have given careful attention to the evidence during the course of the trial and I am certain that you will conduct your deliberations in the same fine spirit that you have so far displayed and with impartiality and fairness reach a just verdict in this case.

In our court system the functions of the Judge and the functions of the jury are clearly defined. It is my duty to instruct you as to what the law is. It is your duty to accept the law as I stated it to you.

Just as I am the exclusive judge of the law, so you are the exclusive judges of the facts. You alone determine the credibility of the witnesses and the weight and effect to be given to the evidence. It is up to you to determine what the facts are from the evidence in this case and from those facts to decide whether the plaintiff has sustained his burden of proof on the claim which he has presented against the defendant.

This trial has been a short one and you have just heard the summations of counsel in which they pointed out the various portions of the proof on which they say you should rely to render a verdict in their favor. I see no reason to further detail the contentions of the parties or the specific proof to substantiate those contentions.

In determining the issues in this case, it is your recollection of the testimony that is to control and not that of either the Court or counsel. Statements made by counsel in arguing the admissibility of evidence and colloquies between the Court and counsel with respect to the admission or rejection of such evidence are not evidence and are not to be considered by you in your deliberations.

The summations of counsel, which you have just heard, are not to be considered as evidence, but only as arguments to you as to what counsel feel you should find from the evidence.

If during the course of the trial the Court sustained an objection by one counsel to a question asked by the examining counsel, you are to disregard the question and any alleged facts contained in the question. Similarly, if after a question has been asked and an answer given by a witness I have stricken the answer from the record, you are to disregard both the question and the answer in your deliberations. The only evidence you can consider is sworn testimony and documents admitted into evidence.

This action is based on a Federal statute known as the Federal Employers Liability Act. That act allows a railroad employee to collect damages for injuries resulting in whole or in part from the negligence of the defendant. The plaintiff does not have any other form of remedy to collect for this injury such as Workmen's Compensation. However, the mere fact that an accident occurred does not entitle the plaintiff to recover. In order to recover damages, it will be necessary for him to establish by a fair preponderance of the evidence that his injury was a result in whole or in part of the negligence of the officers, agents or employees of the railroad.

A fair preponderance of the evidence is no more than the greater weight of the evidence, and this weight is determined by the quality, not the quantity, of the evidence. It has nothing to do with the number of witnesses called to testify on behalf of either party. If the evidence is evenly balanced in your minds, then the plaintiff has not sustained the burden of proof and your verdict must be for the defendant.

The first issue presented by the proof in this case is whether, as plaintiff claims, he injured his back when he slipped on grease and oil while carrying the tank or whether, as defendant claims, he injured his back while lifting the tank.

The plaintiff must prove by a fair preponderance of the evidence that he injured his back because he slipped on grease and oil in order for you to continue your deliberations.

If at this point you find that plaintiff has not met this burden of proof, you must find for the defendant.

However, if you find that the injury occurred as plaintiff claims then you must consider whether the injury resulted from the negligence of the defendant.

Negligence has been defined by our courts as the absence of due care in doing or in failing to do an act which results in injury to someone to whom a duty of care is owed. Due care is such care as the reasonably prudent person would use under the same or similar circumstances.

The defendant was under a duty to use reasonable care to provide the plaintiff with a reasonably safe place in which to work, commensurate with the danger likely to be anticipated in the discharge of his duties. A breach of that duty would constitute negligence.

The defendant is not an insurer of plaintiff's safety. Its duty is to use reasonable care to provide the plaintiff with a reasonably safe place in which to work.

The defendant's duty to provide a reasonably safe place in which to work is an affirmative and continuing one. It must be shown that the defendant knew or should have known of the allegedly greasy and oily condition of the floor. In this regard, you must bear in mind that since the defendant is a corporation it could only act through its employees, and any knowledge which an employee had or should have had is attributable to the defendant.

The plaintiff is not required to prove that the negligence of the defendant or its employees was the sole proximate cause of his injuries. In other words, the plaintiff, under the Federal Employers Liability Act, has sustained his burden of proof if he establishes by a fair preponderance of the evidence that the railroad's negligence played any part, even the slightest, in producing the injuries.

The Federal Employers Liability Act provides that a railroad employee does not assume the risk of his employment or the negligence of a co-employee if the railroad is guilty of any negligence which was the proximate cause of the accident.

Any negligent acts of omission or commission on the part of other employees of the railroad are deemed to be the acts of the railroad itself.

If you find that plaintiff has sustained his burden of proof that the defendant was negligent, and that such negligence contributed to the happening of the accident, then you must consider whether plaintiff himself was guilty of contributory negligence.

Contributory negligence is known in the law as a special defense and the burden of proof is on the defendant to prove plaintiff's contributory negligence by a fair preponderance of the evidence.

I have already defined for you what is meant by burden of proof and a fair preponderance of the evidence.

Contributory negligence would mean that there was a failure on the part of the plaintiff to exercise such care for his own safety as would be exercised by a reasonably prudent person under similar circumstances so that the accident was caused in whole or in part by his own negligence.

As I have said, the burden of proof with respect to the plaintiff's contributory negligence is upon the defendant, and if you find that the evidence on this issue is in even balance, then you would have to find that the plaintiff was free from contributory negligence.

However, even if you should find that defendant has sustained its burden of proof that negligence on the part of the plaintiff contributed to the happening of the accident, this is not an absolute defense to plaintiff's cause of action. You must determine the degree of fault by percentage and apportion the damages accordingly.

Thus, if you find liability on the part of the defendant

because of negligence and that negligence on the part of the plaintiff contributed to the happening of the accident, you will take the total amount of damages which you find that the plaintiff has suffered and deduct from that amount the percentage of the overall negligence which is attributable to the plaintiff.

For example, if the plaintiff's own negligence constituted 40 percent of the total cause of the accident, you will deduct 40 percent from the total amount of the damages which you find plaintiff suffered as a result of the accident.

If you find that the negligence of the plaintiff contributed to 60 percent of the total cause of the accident, then you will deduct 60 percent from the total amount of the damages which you find plaintiff suffered as a result of the accident.

If you find that the plaintiff was not contributorily negligent at all, he would then recover the total amount of the damages which you find plaintiff suffered as a result of the accident.

The determination is wholly up to you and the fact that I have set forth certain percentages in attempting to clearly illustrate the principle of law applicable to contributory negligence in this type of case should not affect your decision in any way. I have simply given them to you as an example.

If you determine that the injury complained of was proximately caused by the negligence of the defendant, then and then only will you consider the amount of money plaintiff is entitled to receive to compensate him for the injuries he sustained, taking into consideration the apportionment of the damages as I have just defined it for you.

In determining damages in a personal injury case, the law insofar as possible attempts to award a just and fair compensation for a loss which directly and naturally flows from a wrong done by a defendant to a plaintiff. The damages awarded must be purely compensatory and neither inadequate nor excessive.

If you determine that damages should be awarded, you should include such sums as you find would compensate the plaintiff for the pain and suffering and for loss of earnings which he has shown by a fair preponderance of the evidence was suffered as a result of the accident.

Pain and suffering shall include both pain and suffering in the past, up to the present, and such pain and suffering as you believe from the evidence the plaintiff is likely to experience in the future, taking into account the nature and extent of disability.

If you believe that the pain and suffering will be permanent, you may take into consideration the life expectancy of the plaintiff, which is 19.4 years.

An injured person is entitled to recover for the harm suffered through the other person's negligence even though the precise nature and extent of the injuries as they finally develop should be more severe than could ordinarily be foreseen.

In other words, a person is chargeable for all the injuries and suffering which his negligent conduct brought about, even though the plaintiff's injuries were aggravated by the plaintiff's own predisposition.

Thus, if you find that plaintiff had a preexisting or latent degenerative disk condition which was activated or aggravated by the accident and that had the accident not occurred the condition would have remained quiescent, then the plaintiff is entitled to compensation for the resulting damage.

Obviously the amount to be awarded for pain and suffering and the nature of the injury cannot be determined with mathematical certainty. However, the amount of the award must be based on fact and not on mere conjecture or speculation. Under no circumstances are you justified in making an award to the plaintiff simply because he may have been seriously injured or from a feeling of sympathy or a desire to give him something.

There has been allusion to visits by the plaintiff to a psychiatrist and that plaintiff may have need of psychiatric

care and treatment. You may treat ordinary mental distress attendant upon an injury as an element of pain and suffering. However, you may not consider as an item of damage in this case possible mental illness requiring psychiatric treatment.

Loss of earnings falls into two categories: loss of wages to date and future loss of income, if any, should you find that the earning capacity of the plaintiff has been impaired entirely or diminished in part.

One who has been injured by the negligence of another must make a reasonable attempt to minimize damages by resuming gainful employment as soon as he reasonably can.

As to his loss of earnings, plaintiff has testified that at the time of the accident he was earning $117 a week or a total of $5,875 a year, and that he could not work for two and a half years. He then returned to work in September of 1968 and worked two or three days a week until last month. If you find that the plaintiff's injuries attributable to the accident are permanent and that his future earnings will thereby be affected, you must consider in arriving at the amount of damages you will award the plaintiff for future loss of earnings, his age, his physical condition, the type of employment before the injuries, his work expectancy and the type of employment he would be able to engage in subsequent to the injuries.

You may consider the life expectancy tables as bearing upon the period of plaintiff's work expectancy. Plaintiff is 55 years old today and has a life expectancy of approximately 19.4 years. You may also consider the fact that he may retire on Social Security or other benefits when he reaches the age of 65, ten years from now.

The present wage scale for the job plaintiff was employed in is $168 a week or a total of $8,730 a year. You may use this figure as some indication of plaintiff's future loss of earnings. In arriving at a figure representing future loss of earnings, you must reduce it to its present value. It is self-evident that a given sum of money in

hand is worth more than a like sum of money payable in installments over an extended period of time. For example, and this is only an example, if you find that plaintiff is permanently and totally disabled and in consequence of which he will be deprived of an annual income at the rate of $5,000, and you find that he has a work expectancy of ten years, the loss of income is not ten years multiplied by $5,000 or a total of $50,000, the loss is a lesser sum. You must figure out what the present sum in hand invested at a fair rate of interest will give plaintiff $5,000 yearly by the use of principal and interest, so that the entire sum is exhausted at the end of the ten-year period.'

Remember, the fact that I have used certain figures in giving you this example should not have any effect on you in making your determinations.

In determining the present value of future loss of earnings, you estimate whatever rate of interest you think is fair under present market conditions, considering plaintiff's education, experience and ability to invest. To assist you in your computation, I am submitting a chart showing the present value of $1 per year payable at the end of each year for a term of years discounted at various specified rates. This is the chart and you will be able to read the instruction on it in the jury room.

Whatever figure you determine should be awarded to the plaintiff for future pain and suffering should be divided by 19.4 years, his life expectancy. This annual figure should be discounted in the same manner as I have described to you for discounting the future loss of annual income.

In your search for the truth, you must use plain everyday common sense. You must not be governed by sympathy, bias or prejudice. You have seen the witnesses on the stand and observed their manner of giving testimony. How do they impress you? Did they appear to be testifying frankly and candidly? In determining what degree of credit you should give a witness' testimony, you may consider his conduct, his manner of testifying and his interest

in the outcome of the litigation. Plaintiff of course is an interested witness. Employees of the defendant are interested witnesses. You may consider that fact in determining the weight and credibility of their testimony.

However, it does not necessarily follow that merely because a person is interested in the result he is not capable of giving a truthful version of an occurrence. If you believe that a witness wilfully testified falsely to any material fact, you may disregard his testimony altogether or you may accept such portion of his testimony as you believe worthy of credence.

What you accept or reject as credible evidence is for you to determine, but you may not go outside the evidence to speculate as to the facts.

Inconsistencies and contradictions appearing in the testimony may or may not be explainable, so, too, they may be wilful or inadvertent, deliberate or innocent, major or minor. It is for you to appraise the significance of any inconsistencies and contradictions in relation to the credibility of a witness.

The plaintiff's hospital records have been introduced in evidence. The facts contained in them are evidence for you to consider. The credibility and weight that you give to them is within your sole discretion.

There are generally speaking two types of evidence from which a jury may properly find the truth as to the facts in a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, that is, the proof of a chain of circumstances according to the existence or non-existence of certain facts.

Circumstantial evidence is the proof of facts from which a fact in issue may reasonably be inferred. You may draw such inferences as reason and common sense lead you to draw from facts which you find to have been proven. Circumstantial evidence is not on any different or lower plane than direct evidence. No greater degree of certainty is required of circumstantial evidence. The law simply re-

quires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

You have heard the testimony of doctors for and on behalf of the plaintiff.

How do you as laymen determine the facts from medical testimony? You are to act in exactly the same way that you would appraise and determine the credibility of an ordinary witness as I have already outlined to you. Ordinary witnesses are allowed to tell you only what they see, hear or experience. Experts such as physicians who are called are permitted also to tell the jury their opinions by reason of their training and knowledge in their particular field. As you well know, an opinion is something a witness forms in his own mind and that is based on specific facts from which, using his judgment, training and experience, he draws certain conclusions. Of course, if you don't believe the facts which form the basis of the expert's opinion, then his opinion is valueless. But otherwise you will treat an expert's opinion as evidence which you have heard.

You may accept his opinion or you may reject it in whole or in part, and it is entirely up to you as to what you will do with it as testimony and what credibility you will give to it.

Reference has been made by plaintiff to the failure of the defendant to call certain of its employees, Billelo and Mazzio, who were eyewitnesses to the accident. You may draw an inference, if you wish, that if such witnesses were called by the defendant they would have exposed facts unfavorable to the defendant. As to the failure of the defendant to call Dr. Balensweig, I should point out that defendant is entitled to rely on testimony which he has elicited from plaintiff's doctor on cross-examination which defendant claims proves its contention without having to place its own doctor on the stand for that purpose. Dr. Capozzi is no longer in the employ of the defendant, and he was available to either side in this lawsuit, and you may

draw whatever inference you wish as to what he would testify to, either for or against the defendant or for or against the plaintiff.

I have sought to avoid any comments which might suggest that I have personal views on the evidence. I have no views as to the fact of this case and you are not to assume that I have such views. This charge is given to you solely to instruct you as to the law applicable to the case.

The actions of the judge during the trial in ruling upon motions or objections by counsel or in statements to counsel or in attempting to clearly set forth the law in these instructions are not to be taken by you as any indication of any determination of the issues of fact. The actions of the Court relate solely to procedure and law. You and you alone determine the facts.

There are 12 members on this jury. Any verdict must be the unanimous verdict of all of you. An 11 to 1 verdict or a 10 to 2 verdict is not a verdict in the Federal Court.

This case is obviously an important one to the plaintiff. It is equally important to the defendant. I am submitting it to you in complete confidence that you will comply with your oath as jurors and decide the case fairly and impartially and without fear or favor.

If you should desire any of the exhibits, they will be sent to the jury room upon request. If you want any of the testimony or any portion of this charge read, that can also be done at your request.

If there are any exceptions to the charge, I will take them in the robing room.

(In the robing room.)

Mr. Reilly: I think I might have taken this exception before, your Honor, and it refers to No. 6 of the supplemental requests, in which I asked that any negligence of the defendant which contributed in any way or manner toward any injury under Larson v. New York Central Rail Road. I except to that portion of your charge which limited the decision of the jury to only grease and oil.

The Court: That is the way the case was submitted. The grease and oil, according to the plaintiff, was covered by dirt. He couldn't see it. That is his theory.

Mr. Reilly: The only point I might make, they could consider the fact, this was also testified to, that the light was not adequate for the purpose.

The Court: Yes. Even if there was light, according to his testimony, he couldn't see it, it was covered by dirt. He carefully came within another case in this circuit.

Mr. Reilly: I object to that portion of the Court's charge in which he charged in relation to Social Security being received at age 65. In this case and under this contract the men can work up until age 70.

The Court: But he also can retire at age 65.

Mr. Kristol: I except to the portion of the charge which said that the absence of Mazzio and Billelo would permit the jury to draw an inference adverse to the railroad without saying that the witnesses were equally available to the plaintiff.

The Court: That is not important according to a case in New York 329 Fed. 2d 936, where it is perfectly clear that that inference may be drawn. Also see McCormack on Evidence, Section 249.

Mr. Kristol: The other point I had was in Mr. Reilly's summation to the jury he said Mr. Mazzio was in the courtroom, and that is not true.

The Court: That is too late now.

(In open court.)

The Court: Swear the marshals.

(Marshals duly sworn.)

The Court: Mrs. Lederman, ladies and gentlemen of the jury, you may follow the marshals out.

(Jury retired at 2:30 p.m.)

The Court: I assume that if there are any requests for exhibits, you can agree among yourselves?

Mr. Reilly: Fine, your Honor.

(Recess.)

(The following took place in the robing room at 3:00 p.m.)

The Court: We have a request from the jury:

"Mr. Felice's report to his foreman with Mr. Billelo's statement as to what took place."

What is that?

Mr. Kristol: I have that on my desk.

The Court: Secondly:

"Dr. Compozzi's report."

Mr. Kristol: That is the white sheet tied into Mrs. Carroll's card.

The Court: There must be a lawyer on that jury.

"Was Mr. Billelo examined before the trial?"

Mr. Reilly: Yes.

The Court: I have to tell them this is not a matter for their consideration and this was not brought to the attention of the Court and jury. I cannot tell them yes, that he was.

Get the exhibits and we will call the jury in.

Mr. Reilly: It seems to me reading that report, your Honor, we did have a ruling on your part that you interpreted this as a statement that Felice made to the foreman in addition to Billelo making a statement.

The Court: That is true, and I think that is what the witness testified to also.

Mr. Reilly: At this time might I object to that interpretation on the part of the Court since nowhere does it state that this is a statement of Felice to the foreman.

The Court: I think the foreman said he reported it to him, and your client testified how the accident happened.

Mr. Reilly: I think Caradonna testified he had absolutely no recollection of this.

The Court: True.

Mr. Kristol: But he also said it was his usual practice to take statements on this kind of accident.

The Court: I am taking this to mean that this is not only Felice's testimony to Caradonna, but also Billelo's statement to Caradonna.

Mr. Reilly: Felice testified he slipped on oil in connection with that.

The Court: That is what he says, but it has been reported in several places, to wit, the hospital record, which he gave himself, that he did it while lifting. That is the issue, who are they going to believe, the witness on the stand now or the report at the time the accident happened. After that, you get the money.

Mr. Tellier: Felice says he told the foreman he slipped on oil. That is not in the report.

The Court: I am taking this report in conjunction with the foreman's testimony as to what his duty was in taking it down, plus the fact that Felice admitted he spoke to him. Who you are going to believe is something else. That is for the jury.

(In open court; jury present.)

The Court: The Court has received a note from you which reads as follows:

"Mr. Felice's report to his foreman with Mr. Billelo's statement as to what took place."

That is Exhibit A and we will give that to you.

"Was Mr. Billelo examined before the trial?"

That is a matter which we do not know. When I say "we," I mean the jury and the Court. Whether he has or has not, we have no knowledge as far as the testimony in this trial.

"Dr. Capozzi's report."

That is Defendant's Exhibit B. We will give that to you.

You may retire and continue with your deliberations.

(Jury retired at 3.05 p.m.)

(Court Exhibit 1 marked in evidence.)

(Recess at 3.05 p.m.)

(4.30 p.m., jury present.)

The Clerk: Members of the jury, please answer as your names are called.

(Roll call of jury.)

The Clerk: Madam Forelady, have you agreed upon a verdict?

The Forelady: Yes.

The Clerk: How do you find?

The Forelady: We find for the plaintiff.

The Clerk: In what sum?

The Forelady: $100,460.

The Clerk: Members of the jury, listen to the verdict as it stands recorded. You say you find for the plaintiff in the sum of $100,460, and so say you all?

(The jury answers in the affirmative.)

The Court: Do you wish the jury polled, Mr. Kristol?

Mr. Kristol: Yes.

(The jury polled.)

The Court: The jury is excused with the thanks of the Court. Report tomorrow morning to Room 109.

You listened very attentively to this case. In our system of justice and law, that is all anyone can ask for.

Mr. Reilly: If the Court please, may I express my thanks for the consideration given in this case.

The Court: The jury is excused.

(Jury excused.)

The Court: Any motions?

Mr. Kristol: Your Honor, I believe I have ten days in which to reserve decision to make my motions.

The Court: Motions returnable in ten days.

APPENDIX B

Opinion by the United States Court of Appeals For the Second Circuit.

No. 391—September Term, 1969.

(Argued January 7, 1970 Decided February 25, 1970.)

Docket No. 33714

GABRIEL FELICE,

Plaintiff-Appellee,

against

THE LONG ISLAND RAILROAD COMPANY,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY, *Circuit Judge,* and MANSFIELD, *District Judge.**

Appeal by defendant in a FELA action from a judgment of the District Court for the Southern District of New York, Charles M. Metzner, *Judge*, after a jury trial, on the ground of trial errors. Reversed.

HOWARD G. KRISTOL, Esq. (George M. Onken, Jamaica, New York and James C. Hansen, Esq., New York, New York, of Counsel), *for Defendant-Appellant.*

* Southern District of New York, sitting by designation.

PETER M. J. REILLY, Esq. (Edward G. Dougherty, Esq., and Roland J. Tellier, Esq., New York, New York, of Counsel), *for Plaintiff-Appellee.*

FRIENDLY, *Circuit Judge:*

In this action in the District Court for the Southern District of New York, Gabriel Felice sought to recover under the FELA for a back injury experienced while working at a shop of the Long Island R.R. After trial before Judge Metzner and a jury, he received a judgment for $100,460. Not disputing that there was sufficient evidence for the verdict, the Long Island complains of prejudicial errors at the trial.

On March 8, 1966, Felice, a car repairman, was working with two others, Bilello and Mazzeo, in removing, from the underside of railroad cars, cylindrical tanks that hold the pressurized air used in operating brakes. In the course of this work he seriously injured his back. On March 12 he consulted Dr. David Lipton, who directed hospitalization at Smithtown General Hospital, where he was placed in traction. When this did not succeed in relieving his pain, Dr. Moses Ashkenazy, a neurosurgeon, and Dr. Lipton performed a laminectomy on March 28. Fluid developed in the wound and was removed in April. On May 23 Felice was readmitted for severe leg pain, and another laminectomy and a fusion were performed on June 1.

The controversy concerned the cause of the injury. The railroad's theory was that this had resulted from the mere act of lifting the heavy tank—a cause that would qualify under a workmen's compensation act but not under the FELA. Felice testified that the railroad had failed to see that the premises remained reasonably clean and safe, and that he had slipped on a concealed spot of grease and oil. Defendant's case against this consisted of various records

made shortly after the accident which report Felice as saying nothing about slipping. These included:

(1) An accident report prepared on March 8, 1966, by Caradonna, Felice's foreman. Under the rubric "Explanation of how reported injury occurred: (including actions leading up to alleged accident)," the report said "Lifting a tank on the hilo with another helper—back just went." The report named Bilello as a witness and quoted him to the same effect.

(2) A card filled out by a nurse in the office of the company's Medical Examiner, Dr. V. A. Capozzi, on Felice's first visit on March 11, 1966, reciting as his history, "picking up a tank with a helper (expansion tanks for brakes) picked up into hylo, pain in lower back . . .," and a statement reported in the Medical Examiner's report of the same visit, reciting under the heading "Statement of injured": "states—picking up a tank with a helper (expansion tanks for brakes) picked up into hylo, pain in lower back . . ."

(3) A record of the Smithtown General Hospital on Felice's admission on March 12, 1966, reciting "PT-while working, lifted a heavy object and felt a snap in his back with marked pain since then."

(4) Workmen's Compensation Attending Physician Reports dated March 14 and 21, 1966, signed by Dr. Lipton, which said in answer to the questions "State how injury occurred and give source of this information"; "lifted heavy object injury to back."

With respect to item (1), Caradonna testified that he "would say" Felice had reported the injury but was not certain. Felice admitted that he reported the injury to Caradonna. Caradonna conceded that there had been complaints that the pit and aisles of the shop were dirty with grease, and that he had observed this at times.

I.

Plaintiff in his pre-trial memorandum had "reserved the right" to call Mazzeo; defendant had stated that it would call Bilello and Mazzeo. Neither was called. At plaintiff's request the court charged:

> "Reference has been made by plaintiff to the failure of the defendant to call certain of its employees, Bilello and Mazzeo, who were eye witnesses to the accident. You may draw an inference, if you wish, that if such witnesses were called by the defendant they would have exposed facts unfavorable to the defendant."

Defendant made timely objection to this charge on the ground that the witnesses were equally available to both sides. The court overruled this, citing *Case* v. *New York Central R.R.*, 329 F.2d 936 (2 Cir. 1964), and McCormick, Evidence § 249 (1954).

We think that in the press of trial the judge read these authorities too hastily. The *Case* decision, also a FELA case, concerned the propriety of admitting evidence by the defendant why it had not produced employees claimed by the plaintiff to have seen the accident; while we referred to the established principle that unexplained failure by a railroad to call such employees would give rise to an inference against it, and cited the well-known FELA case of *Chicago & N.W. Ry.* v. *Kelly*, 84 F.2d 569, 572 (8 Cir. 1936), we did not say that if the failure had not been explained, the inference against the employer was the *only* one the jury would have been entitled to draw. McCormick states, at p. 534, that where the uncalled witness', "relationship with one of the parties is such that the witness would ordinarily be expected to favor him"—citing the case of a family doctor—"then if such party does not produce his testimony, the inference arises that it would have been un-

favorable." He then deals with the situation where as here "the witness would be as likely to be as favorable to one party as the other,"[1] and concludes that the judge "should permit either party to argue the inference against the adversary." But that does not mean that the *judge* may instruct the jury to consider the inference against one party and refuse to instruct concerning the inference to which that party is equally entitled against the other. If in such a situation one party requests a charge concerning the inference and the other objects, the judge, if he decides to charge on the subject at all, must do so in an even-handed manner, explaining to the jury why it would have been reasonable for either party to call the witness and what inference can logically be drawn from failure to do so.[2]

Plaintiff called Dr. Lipton. Just before the doctor took the stand, the records of plaintiff's treatment at Smithtown Hospital had been received without objection. Counsel told Dr. Lipton that he could refer to his notes to refresh his recollection if he so desired. He proceeded to testify that when he first saw Felice on March 12, 1966, he took a

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[1] We think it plain that this was the situation. Whatever might be the case in an action by a third party against the employer, we see no factual basis in this day and age for thinking that, in the absence of evidence of personal hostility, a subordinate employee would be more favorable to a corporate employer than to a fellow-worker.

[2] In giving the charge, the trial judge stated "You may draw an inference, if you wish, that if such witnesses were called by the defendant they would have exposed facts unfavorable to the defendant." It would have been more accurate to characterize the inference, if one should be drawn by the jury against one side, as permitting the jury "to give the strongest weight to the evidence already in the case in favor of the other side, and which has not been, but might have been, effectively contradicted or explained by the absent witnesses." *Seligson, Morris & Neuburger v. Fairbanks Whitney Corp.*, 22 A.D.2d 625, 630, 257 N.Y.S.2d 706, 710 (1st Dept. 1965) (Breitel, J.). The jury should not be encouraged to base its verdict on what it speculates the absent witnesses would have testified to, in the absence of some direct evidence. On the facts of this case, however, the difference is largely semantic.

history, and this was that "while at work for the Long Island Rail Road the patient lifted a heavy object and slipped on grease and twisted himself in an awkward position." Cross-examination developed that this testimony was not based on the hospital records but on a note the doctor had with him stating "Lifted heavy object and slipped on grease." Although at first the doctor said that this was "either written by himself or taken as a history by my girl," and that he believed it was in his handwriting, further cross-examination indicated that the portion of the note relating to the cause of the injury was written by his girl, whose name the doctor could not recall.[3] Defendant's counsel objected to the testimony on the ground that no such record had been listed among the exhibits designated in the pre-trial order. Still further cross-examination developed that Dr. Lipton had no recollection whatever of the history Felice had given.

A motion to strike the testimony was denied. It should have been granted. Dr. Lipton's recollection of Felice's statement was not refreshed; no adequate foundation was, or apparently could have been, laid for qualifying the note as a record of past recollection, McCormick, Evidence §§ 277, 279 (1954); and, whether or not the note would be admissible under the Federal Business Records Act, 28 U.S.C. § 1732, an issue discussed below, defendant was entitled to rely on the pre-trial order.

III.

This action was begun on April 4, 1966. Plaintiff was allowed to place in evidence, over objection, an Attending Physician's Medical Report by Dr. Ashkenazy dated May 18, 1966, which, under the same rubric with reference to the

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[3] Dr. Lipton offered to search his records and give the Railroad's counsel the girl's name. Due to other engagements of the doctor, the defense never ascertained this.

occurence of the injury mentioned in item (4) above, recited:

> Pt. states: "I was lifting a tank and I slipped and threw my back out of line."

He was also allowed to put in evidence a letter from the same doctor dated August 16, 1966, to the Railroad's Claim Agent, stating that Felice had been referred by Dr. Lipton "with the history that he was lifting a heavy object of about 200 pounds of weight on 3-8-66 when he slipped on some grease and suddenly had to bear the weight in an awkward position. He felt a snap and a tear in his lower back." Since Dr. Ashkenazy was not called as a witness, these statements were admissible, if at all, only by reason of the New York or Federal Business Records Act, CPLR 4518, 28 U.S.C. § 1732. We can limit ourselves to the federal statute since any attempt by plaintiff to bring himself within the New York statute would face the barriers not only of *Johnson* v. *Lutz*, 253 N. Y. 124 (1930), requiring that the entrant have witnessed the event or have obtained the information from one under a "duty" to transmit the facts, but also of *Williams* v. *Alexander*, 309 N. Y. 283 (1955), excluding statements in medical records of "acts or occurrences . . . not germane to diagnosis or treatment. . . ."[4]

It would be hard to sustain the thesis that this court's many pronouncements concerning the Federal Business Records Act are wholly consistent, although any discord in the decisions is considerably less than in the dicta.[5] Perhaps it is time to return to the wise statement of Judge Learned Hand in *United States* v. *Grayson*, 166 F. 2d 863, 869 (1948), approved both by Wigmore, § 1530, and by

[4] For evidence that this rule also has its difficulties of application, see the 3-2 decision in *Del Toro* v. *Carroll*, App. Div. 1st Dept., 38 L.W. 2392 (Dec. 16, 1969).

[5] The thoughtful and comprehensive opinion by Judge Tenney in *Yates* v. *Bair Transport, Inc.*, 249 F. Supp. 681 (1965), analyzes most of the decisions up to that date.

McCormick, §§ 283, 286, 290, and at least approaching the New York rule of *Johnson* v. *Lutz*, *supra*:

> In cases where an entrant records what he has heard, the document will be evidence of what they have told him only in case it appears that it was part of their regular course of business to report to him what the declarants themselves knew, as it was part of his business to record what they said. The statute did not mean to make competent whatever the entrant picked up from random sources, although it was part of his business to pick up information where and when he could and make a record of it. The "act, transaction, occurence or event" which the entrant records must be one of which either he had knowledge, or which he learns from a declarant who shall "in the course of the business transmit the information for inclusion in the memorandum." "Multiple hearsay" is no more competent now than single hearsay was before [footnotes omitted].

To be sure, the last sentence, taken alone, would be misleading. Aside from the situation referred to by Judge Hand, where each declarant was under a business duty to make his report to the next declarant or the ultimate recorder, "multiple hearsay" for which the business record is the last level is admissible if each prior level falls within a recognized exception to the hearsay rule. Thus a hospital nurse's entry of what a resident told her of symptoms the patient had related to him would be competent evidence of the existence of the symptoms. The nurse's entry of the resident's declaration is competent under the Business Records Act to prove that the patient made the statement. The patient's statement would be admissible under the exception to the hearsay rule for declarations of bodily condition made to physicians consulted for treatment.

Hospital and doctors' records of a patient's account of the cause of an injury differ in the lesser trustworthiness

both of the patient's statement and of the reporting and entry, particularly to the extent that the patient's account is not relevant to diagnosis and treatment. It is far from clear that it is part of the regular course of business for a nurse taking down a patient's history to report the extraneous details, cf. *Taylor* v. *B. & O. R.R.*, 344 F. 2d 281, 285 (2 Cir.), *cert. denied*, 382 U. S. 831 (1965), and in any event, even if the records are admissible under the Business Records Act to prove that the patient made the statement, there is no general exception to the hearsay rule which would admit evidence of the statement as proof of the fact stated. Even the minority of courts which have approved the receipt of a patient's account to a doctor or nurse about the cause of an accident in support of the patient's case have restricted the exception to statements about the general character of the cause—e.g., a fall as opposed to a collision—rather than reconstructions of the details. McCormick, Evidence § 266 (1954). There would seem to be no sensible basis for receiving an entry by a doctor or nurse concerning what a patient had said regarding the causes of an accident unless a live witness—the patient, the entrant or a bystander—would have been allowed to testify to the statement. We have found only two cases in this circuit that have done so, *Tucker* v. *Loew's Theatre & Realty Corp.*, 149 F. 2d 677 (1945), and *Lorensen* v. *Sinclair Refining Co.*, 271 F. 2d 528 (1959). The *Tucker* opinion was by Judge Clark and the *Lorensen per curiam* was also written by him. See also his dictum in *White* v. *Zutell*, 263 F. 2d 613, 615 (2 Cir. 1959). But the *Tucker* opinion pointed out that any error in receiving the statement would have been harmless, and the *Lorensen per curiam* said that "the statement appears to be quite colorless against the facts otherwise proven." Judge Clark's views with respect to the scope of 28 U.S.C. § 1732 were markedly broader than those of many of his colleagues, see *Central R.R. Co.* v. *Jules S. Sottnek Co.*, 258 F. 2d 85 (1958), *cert. denied*, 359 U. S. 913 (1959); *United States* v.

New York Foreign Trade Zone Operations, 304 F. 2d 792 (1962), and are scarcely consistent with statements in recent decisions, of which *Juaire* v. *Nardin*, 395 F. 2d 373, 379 (2 Cir.), *cert. denied*, 393 U. S. 938 (1968), is an example.

The only basis for admitting statements by Felice concerning the cause of his injury made some time after the event would be as prior statements that would be consistent with his testimony at trial and would tend to overcome the impeachment that defendant sought to accomplish from the absence of any reference to slipping in the four reports on which it relied. Judge L. Hand's opinion for this court in *United States* v. *Sherman*, 171 F.2d 619, 621-22 (1948), *cert. denied*, 337 U.S. 931 (1949), is a leading authority against the use of consistent statements for rehabilitation. However, the apparent logic of the position that "since the self-contradiction is conceded, it remains as a damaging fact, and is in no sense explained away by the consistent statement," 4 Wigmore, Evidence § 1126 at 197 (3d ed. 1940), is criticized by Wigmore on the ground, rather pertinent here where the self-contradiction is an alleged omission which the plaintiff denied, that the consistent statement might lead the trier to conclude that the self-contradiction had not occurred. *Id.* at 198-99, quoting Judge Cooley's opinion in *Stewart* v. *People*, 23 Mich. 74 (1871). See also *United States* v. *Corry*, 183 F.2d 155, 157 (2 Cir. 1950). Furthermore there is a tension between a supposed general rule forbidding the use of consistent statements to rebut impeachment on the ground of inconsistent ones and the exception permitting the use of such statements to rebut a charge of recent contrivance, *United States* v. *Fayette*, 388 F.2d 728 (2 Cir. 1968); 4 Wigmore, Evidence § 1129. In a personal injury case not unknown to fame, a panel of this court including Judge L. Hand allowed use of consistent statements by a plaintiff for this purpose, *Tompkins* v. *Erie R. Co.*, 90 F.2d 603, 605-06 (1937), rev'd on other grounds, 304 U.S. 64 (1938). The New York courts have likewise done so. See, e.g., *Donovan*

v. *Moore-McCormack Lines, Inc.*, 266 App. Div. 406, 42 N.Y.S.2d 441 (1st Dept. 1943); *Moore* v. *Leventhal*, 303 N.Y. 534 (1952) (rehabilitation of defendant's witness); *Zavlich* v. *Thompkins Sq. Holding Co.*, 10 A.D.2d 492, 200 N.Y.S.2d 550 (1st Dept. 1960).

While a good deal of latitude should thus be accorded trial judges in admitting prior consistent statements for rehabilitation, the statement attributed to the plaintiff in Dr. Ashkenazy's Attending Physician's Medical Report of May 18, 1966, falls beyond this, even if—which we do not decide—the Federal Business Records Act would allow it to come in without oral testimony. A statement made two months after the injury has no sufficient logical tendency to show that statements made within a week were incomplete. And the exception allowing use of prior consistent statements to rebut a charge of recent contrivance requires that they be prior to the contrivance, see *United States* v. *Sherman, supra*, 171 F.2d at 622; *Tompkins* v. *Erie R. Co., supra*, 90 F.2d at 606 ("before he ever knew Mr. Nemeroff, his attorney"), *Ferris* v. *Sterling*, 214 N.Y. 249, 254 (1915); *Crawford* v. *Nilan*, 289 N.Y. 444, 450-51 (1943); McCormick, Evidence § 49 at 108-09, a condition not met here since the statement was made six weeks after this action was commenced. The statement allegedly made to Dr. Lipton's nurse on March 12, 1966, which was the basis for Dr. Lipton's report to Dr. Ashkenazy and for Dr. Ashkenazy's letter to the railroad's Claim Agent, might stand differently. It could well cast doubt on the completeness at least of Dr. Lipton's reports of March 14 and 21, on which the Long Island relied.[6] However, even if the nurse's note would have been admissible under the Federal Business Records Act, an issue on which we think it unnecessary to express an opinion since the question may

[6] Note also McCormick's suggestion that when the self-contradiction amounts to an importation of inaccurate memory, a "consistent statement made when the event was recent and memory fresh should be received in support." Evidence, § 49 at 109.

not arise on a new trial, and if Dr. Lipton's report to Dr. Ashkenazy would have fallen under the same rubric, which seems unlikely, clearly Dr. Ashkenazy's description of the contents of that report in his letter to the Claims Agent was inadmissible hearsay.

We need not decide whether any one of the three errors, standing alone, would demand reversal. Their combined effect requires that the judgment be reversed for a new trial consistent with this opinion.

APPENDIX C

(JUDGMENT)

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of February, one thousand nine hundred and seventy.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HENRY J. FRIENDLY,
Circuit Judge,

HON. WALTER R. MANSFIELD,
District Judge.

GABRIEL FELICE,
Plaintiff-Appellee,

v.

THE LONG ISLAND RAIL ROAD COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix C.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO
Clerk